



BOARD OF INQUIRY (*Human Rights Code*)

IN THE MATTER OF the Ontario *Human Rights Code*, R.S.O. 1990, c.H.19, as amended;

AND IN THE MATTER OF the complaint by James Lawrence Moffatt dated November 26, 1991, alleging discrimination in employment on the basis of sexual orientation and handicap.

B E T W E E N :

Ontario Human Rights Commission

- and -

James Lawrence Moffatt

Complainant

- and -

Kinark Child and Family Services
Harry Oswin

Respondent

DECISION ON IMPLEMENTATION OF REMEDY

Adjudicator : Katherine Laird

Date : May 26, 2000

Board File No: BI-0056-95

Decision No : 00-009-R

Board of Inquiry (*Human Rights Code*)
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APPEARANCES

| | | |
|-------------------------------------|---|----------------------------|
| Ontario Human Rights Commission |) | |
| |) | Ena Chadha, Counsel |
| |) | Bill Holder, Counsel |
| James Lawrence Moffatt, Complainant |) | |
| |) | Brian A. Kelsey, Counsel |
| |) | George Vassos, Counsel |
| Kinark Child and Family Services |) | |
| Harry Oswin, Respondents |) | |
| |) | Brian D. Mulroney, Counsel |
| |) | |

BACKGROUND

On November 2, 1999, the Board of Inquiry ("Board") released my decision ordering certain remedies in respect of the complainant James Lawrence Moffatt ("Moffatt") against Kinark Child and Family Services ("Kinark"). I reserved on one aspect of the remedy: the terms of an employment contract which Kinark was required to offer to Moffatt. In my decision, I stated that I was prepared to order Kinark to offer Moffatt a "limited-term" employment contract at a "more junior level" than the position which he held in 1991. However, I asked the parties to attempt to negotiate mutually satisfactory terms of employment, failing which I would re-convene the hearing on January 13, 2000. It was, and is, my view that a negotiated contract would be more likely to meet the needs of both parties, and could be more carefully tailored to the exact circumstances affecting the employment relationship.

Unfortunately, the parties were unable to arrive at a negotiated solution. The hearing was re-convened by conference call, and times were set for the filing of submissions, concluding on February 14, 2000. However, the parties subsequently agreed to attend a mediation session with the Chair of the Board to attempt once more to explore settlement options. A mediation conference took place on February 24, 2000, and settlement discussions continued over a period of several days, ending without success.

Following the mediation effort, counsel for Kinark sought, on consent, permission to file supplementary submissions. This was granted, and submissions were received on April 13, 2000. Unfortunately, the ability of the other parties to respond was affected by the fact that, immediately following the mediation effort, both the complainant and the Ontario Human Rights Commission ("Commission") retained new counsel in respect of this file. I have now heard from all parties in response to the supplementary submissions. This is my decision in respect of the outstanding issue, namely the terms and conditions of an employment contract for Moffatt at Kinark.

SUBMISSIONS OF THE PARTIES

The submissions of the parties were extensive and addressed matters beyond the issue properly before me. I have summarized the positions of the parties below to give context to my Order.

The Commission filed the first submission, and took the position that Kinark was inappropriately restricting its offer to a position at the level of Child and Youth Worker. Counsel submitted that such an offer was an insult to Moffatt and did not meet the appropriate standard of restoring him to the position which he would have been in but for the discrimination. The Commission submitted that Moffatt should be “afforded the dignity of choice in the matter of his reinstatement”. The Commission also made lengthy submissions with respect to the contents of Kinark’s internal human rights complaint procedure, going beyond their submissions on this issue at the remedy stage of the hearing, by including specifics in respect of a complementary anti-harassment and anti-discrimination policy and an on-going educational programme.

Moffatt filed his own submissions which were attached to those of his counsel. In his submissions, Moffatt expressed frustration with the level of his financial recovery and with the fact that Legal Aid Ontario has a prior claim on the award. He stated that the wage level associated with the position proposed by Kinark was inadequate, particularly given the requirement that he purchase a vehicle. Most importantly, he submitted that the term of the contract was too short to give him time to re-establish his professional reputation at its previous level. He argued that a longer term contract was necessary to enable him to eventually re-gain employment comparable to that which he held in 1991.

The submissions of Moffatt’s counsel were consistent with those filed by his client. On the issue of the employment contract, which is the only issue properly before me at this stage, counsel relied on the purpose of this remedy, as stated in the decision, to argue that Kinark should be required to identify current or potential higher-level positions within the organization which could be made available and offered to Moffatt. The decision stated that the purpose of the employment contract was to restore Moffatt’s professional reputation and to undo the damage resulting from the discriminatory conditions of his prior employment at Kinark. Counsel wrote:

“If Moffatt is seen by his peers to be in a one-year, low-paying job, lower in status than any position he has held since the early 1980's, similar to the positions of people he was actually supervising when he first went to Kinark, there is no possibility that his career or reputation will in any way be restored”.

The responding submissions from Kinark noted that reinstatement was not initially sought by the Commission, and that the written submissions filed by the Commission sought only "reinstatement in employment at a comparable position for a period of one year". Kinark stated that it no longer has middle level management positions, such as was previously held by Moffatt, and that management positions now routinely require a Masters of Social Work, which Moffatt does not have. Kinark's submissions included a specific job offer of a non-supervisory position for a term of one year at a salary range of approximately \$37,000.

Kinark filed further submissions after completion of the mediation process. In a letter dated April 13, 2000, Kinark put another detailed one-year job offer before me, involving a position for which three-year funding was received in February, 2000. The new position is a supervisory one, requiring the successful candidate to supervise seven junior staff and four volunteers. The title of the position is: Co-ordinator, Supervised Access Centre. The salary offered is currently \$38,600, but is under review and expected to increase slightly. Kinark undertook to pay Moffatt at the top of the re-evaluated salary range and to give him benefits entitlement starting immediately.

The Board received two letters from Moffatt subsequent to this job offer. Moffatt listed several difficulties with the offer, including: the length of the contract; the level of responsibility; the absence of opportunity for skills enhancement; the need to travel and to purchase/lease a vehicle; the requirement to work varying hours each week, including weekends. Moffatt also expresses dissatisfaction with the fact that he has not been called for interviews for more senior positions, as required by my previous Order. He does not state that he is aware of specific competitions for more senior positions from which he has been excluded.

Moffatt asks for an order requiring Kinark to provide him with "a minimum of five years employment suitable for a senior Child and Youth Worker who has previously managed one of its largest programs with very positive performance evaluations". He also requests that I order a relocation allowance of \$5000, a computer training allowance of \$5000, and that Kinark allow him the use of an agency vehicle for a period of one year. Finally, he asks that I clarify my Order requiring Kinark to pay for the cost of counselling services up to a maximum of \$5000.

The Commission also responded to the April 13, 2000 submissions from respondent counsel. The Commission supports Moffatt's request for use of an agency vehicle, and for a relocation allowance and a "computer training allowance", and adds that Kinark should provide Moffatt with a \$5000 educational bursary, payable to an academic institution, to allow to upgrade his training to match increased credentialism in the profession during his absence. On the question of counselling, the Commission submits that Kinark should make re-integration counselling available to Moffatt "in addition to the reemployment counselling ordered by the Board". Finally, the Commission asks that the Board to remain seized of this matter to deal with outstanding issues including the contents of Kinark's re-drafted human rights complaint policy.

DECISION

It is discouraging to note that the issues in dispute as between these parties do not appear to be shrinking. The expanding demands of Moffatt and the Commission may stem in part from dissatisfaction with the level of the monetary award. However, the quantum of the financial compensation already ordered is not an issue currently before me. I have already held, in the November 2, 1999 decision, that the evidence did not establish a sufficient basis for ordering compensation for loss of income after January 1994. As I stated on page 29-30 of the decision, although there were several factors which contributed to Moffatt's discontinued job search, and although some of those factors, such as his ill-health, may have been related to the discrimination which he suffered, the evidence did not give me a concrete basis for making a determination as to the extent of a possible causal relationship which could support on-going financial compensation. I will not re-visit that issue in this decision.

As well, I do not purpose to deal with the Commission's submissions on Kinark's human rights policies. These submissions go beyond what was argued in oral submissions and are not properly before me at this stage. The terms of the November 2, 1999 Order require that Kinark submit its human rights complaint procedure to the Commission for review. I understand that negotiations

between the Commission and Kinark on the contents of the policies are continuing. I expect Kinark to make every effort to finalize a policy and procedure for internal human rights complaints which satisfies the standards set by the Commission in this area. The Board does not retain jurisdiction to supervise implementation of this aspect of the Order.

What remains to be determined is the terms and conditions of the employment contract. Before making my assessment of an appropriate remedy based on the submissions, I want to remind the parties that adjudication is a clumsy tool for fashioning a practical remedy such as is sought here. The parties have failed to resolve this issue in lengthy settlement discussions. An ordered remedy is far less likely than a negotiated solution to meet all the needs of the affected parties, and to set the stage for a successful employment relationship.

I also want to emphasize that the employment contract was ordered to redress the damage to Moffatt's reputation arising from the discrimination, not to redress the termination of Moffatt's employment which, on a balance of probabilities, was not found to be caused by the discrimination. From this perspective, I am satisfied with the level of the position offered by Kinark in its April 13, 2000 submission. My earlier decision specified that Kinark would not be required to offer Moffatt a position comparable to the one which he held in 1991, and there were several reasons for that. Most significantly, Moffatt has not worked in the child welfare field since the end of 1993. He has apparently made an effort to keep abreast of developments in the field, but his experience is certainly not current. Although I have found that Moffatt's inability to obtain employment as a child and youth worker has been affected by the discrimination which he suffered at Kinark, in my view, it would not be fair to Kinark's clients, its other staff, or to Moffatt himself, to place him at the top of the organization after so long an absence from the field. Given that the purpose of this remedy is to give Moffatt and Kinark the opportunity to rehabilitate his professional reputation, placing Moffatt at too high a re-entry level could undermine that goal, and set him up for failure, just as readily as might be the case if he was placed at too low a re-entry level.

Although I am satisfied that the level of the position offered is appropriate, I have concluded that the term of the offered contract is inadequate to serve the purpose intended. I am prepared to order that Kinark offer Moffatt the Co-ordinator position for a one-year period, to be renewed for a further period of one-year, subject to performance at the level set by Kinark for the position, to be evaluated at regular intervals of six months. The longer term will give Moffatt an adequate opportunity to demonstrate and enhance his skills, but Kinark will be free to terminate the contract after one year if Moffatt does not meet appropriate performance levels.

I am prepared to order Kinark to re-imburse Moffatt for his reasonable moving expenses, and to offer him a pay advance to cover first and last month's rent and to assist him in leasing a vehicle. I am not prepared to order that Kinark lease a vehicle for Moffatt or provide him with a training and education package valued at \$10,000. I assume that Kinark trains all its employees in the use of its computer system and that it has a policy in respect of educational bursaries for permanent employees. If Moffatt remains with Kinark, he may qualify for financial assistance in upgrading his qualifications.

On the question of counselling, I can only repeat the terms of my November Order which, in my view, answer the issues raised by the submissions of Moffatt and the Commission. On page 34, the decision states:

I further order Kinark Child and Family Services to:

6. Reimburse the complainant for the cost of counselling services of his choice to assist him in successfully re-entering the employment market, up to the amount of \$5,000. (emphasis added)

Moffatt is to be re-imbursed for whatever counselling he obtains to assist him in any way in successfully re-entering the employment market. It is not useful to differentiate between "reintegration assistance" and "reemployment counselling". The counselling is at Moffatt's choice and the services of any particular therapist, for any particular purpose, can only be retained with his agreement.

ORDER

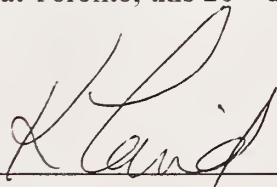
I hereby order Kinark Child and Family Services to extend an offer to James Lawrence Moffatt in accordance with its Supplementary Submissions Re: Reinstatement, filed April 13, 2000, with the following amendments and additions:

- (a) The employment contract is to be for a minimum period of one-year from commencement. The contract is to be renewed for a further one-year period, subject to continued performance at the level set for the position. Performance is to be evaluated at regular intervals of six months.
- (b) Kinark is to reimburse Moffatt, upon provision of receipts, for his reasonable moving expenses in relocating to accept this position, up to a maximum of \$5,000.
- (c) Kinark is to make a pay advance available to Moffatt, up to \$4,000, to facilitate his efforts to secure rental accommodation and a leased vehicle.

This offer is to be held open for consideration for a period of 15 days from the date of this decision. Failing acceptance of this offer by that date, the offer will expire and Kinark will have no further responsibility, pursuant to the decision of November 2, 1999, to re-employ Moffatt.

The Board remains seized of this matter to deal with the issue set out in correspondence from Kinark counsel dated May 1, 2000, specifically the question of the proper disposition of the funds held in trust for Moffatt, and my authority, if any, to give the parties direction in that regard. My decision on the matters dealt with herein is final.

Dated at Toronto, this 26th day of May, 2000



Katherine Laird
Vice-Chair

